IN THE

# Supreme Court of the United States

October Term, 1952.

No. 21.

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

PATRICIA J. REYNOLDS, PHYLLIS BRAUNER, and ELIZABETH PALYA.

# BRIEF FOR RESPONDENTS.

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# BRIEF FOR RESPONDENTS.

## OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 17-21) is reported at 10 F. R. D. 468. The opinion of the Court of Appeals for the Third Circuit (R. 44-58) is reported at 192 F. 2d 987.

## JURISDICTION.

The judgments of the Court of Appeals were entered on December 11, 1951 (R. 59-60). The petition for a writ of certiorari was filed on March 7, 1952, and granted on April 7, 1952. 343 U. S. 918. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

## SUMMARY OF ARGUMENT.

1. It is admitted that the United States, by the passage of the Federal Tort Claims Act, having waived its exemption from claims for damages, shall be liable just as "a private individual under like circumstances" and shall be subject to the Federal Rules of Civil Procedure, including their provisions as to discovery. If, therefore, in a suit against the United States for the recovery of damages arising out of an airplane accident in which the Respondents' decedents were killed, the Secretary for Air, upon being ordered by the District Court under Federal Rule 34 to produce certain documents, chooses to assert a claim of privilege upon the ground that to disclose the requested documents would be contrary to the best interests of the Air Force, he must show the documents to the Court or at least give to the Court sufficient information to enable it to judge whether or not the documents contain anything which it would be contrary to the national security or the public

interest to disclose, in order that the Court may delete any such information. The claim of privilege is a justiciable question for the Court and the Secretary for Air may not successfully assert that he alone shall be the judge of whether his own claim is well founded. This is especially true where there is no showing that the documents in question contain any military secret and the claim is based merely upon the assertion that in the opinion of the Secretary it would be for the best interests of the management and morale of the Air Force that the documents should be kept secret.

2. The United States having refused to comply with the order of the District Court to produce under Federal Rule 34, the Court had power under Rule 37(b)(2) to direct that the Respondents need produce no further proof of the negligence of the United States and that the United States should not be permitted to introduce evidence to controvert the fact that the Respondents' decedents were killed as the result of its negligence.

3. The Respondents, upon showing that they were wholly without knowledge or means of knowledge of the cause of the crash of an airplane owned and operated by the Government, thereby showed good cause under Federal Rule 34 for the production prior to trial, of the Air Force investigation report and of the statements, taken by the Air Force immediately following the accident, of the only three surviving members of the plane crew.

## ARGUMENT.

The argument in the Government's brief begins (p. 15) by saying that these cases present the question of whether the Courts can, in the course of litigation, compel disclosure of documents in the possession of Governmental departments which the officials in charge of them believe it is in the public interest to withhold. This statement is inaccurate and misleading.

Upon the contrary, the basic question here involved is whether those in charge of the various departments of the Government may refuse to produce documents properly demanded under the Federal Rules of Civil Procedure, in a case in which the Government is a party, simply because the officials themselves think it would be better to keep them secret, and this without the Courts having any power to question the propriety of such decision and without thereby subjecting the United States to the procedural disadvantages provided by the Rules in cases of such refusal. The position of the Government is that anything that any of its departments sees fit to declare shall not be disclosed, shall be beyond the reach of the discovery provisions of the Federal Rules and that the department heads alone shall be the judges of what they will disclose. In other words, say the officials, we will tell you only what *we* think it is in the public interest that you should know. And, furthermore, in so deciding we may withhold information not only about military or diplomatic secrets, but we may also suppress documents which concern merely the operation of the particular department if we believe that it would be best, for purposes of efficiency or morale, that no one outside of the department, not even the Court, should see them.

There can be no question that this is the heart of the Government's case. Its counsel so state in their brief (p. 47) where they say:

> "Our central position is that the power of determination is the Secretary's alone."

Should this contention be sustained, clearly it would be the end of any efficient discovery in any case in which the United States was involved.

In the brief for the Petitioner a great deal of confusion is created, in attempting to find support for the Government's position, by mixing together a number of different principles each of which, though sound in the abstract, is wholly inapplicable to the present cases. For example, it is said that the United States statutes give to the heads of departments the right to make rules for the government *of their departments;* that there is a privilege against the disclosure of important diplomatic or military secrets; that Federal Rule 34 itself contains an exception with respect to privileged documents. No one questions that these statements are correct in themselves but, when added together, they are certainly no authority for the proposition that the Secretary for Air shall have the uncontrolled discretion to refuse a departmental report in toto, not only without any attempt to show that it contains military secrets, but where, as here, the actual proof contained in the interrogatories and the answers thereto showed that the information requested had nothing to do with any military secret.

We could rest the Respondents' cases with confidence on the clear and well documented opinion of Judge Maris of the Circuit Court. We can add little to his exposition of the principles upon which these cases turn. With this as a foundation, therefore, we shall consider these principles as they bear upon the various contentions put forward in the Petitioner's brief.

## I. There Is No General Privilege Preventing Discovery of Air Force Accident Reports.

We are glad to note that the Petitioner now concedes not only that under the Federal Tort Claims Act (28 U. S. C. 1346, 2674. Section 410), "the United States shall be liable . . . in the same manner and to the same extent as a

private individual under like circumstances" but also that, as this Court held in *United States v. Yellow Cab Company*, 71 S. Ct. 399; 340 U. S. 543 (1951), the Federal Rules of Civil Procedure apply to all suits under the Tort Claims Act. Further, that the Rules are intended to make the discovery procedure under Rules 26 to 37 applicable to the United States (Petitioner's brief pp. 55-57). This being so, what is the basis for the contention that Rule 34, authorizing orders for the production of documents, and Rule 37(b)(2), covering penalties for failure to comply with such orders, should not apply to the Government?

There has been no case in which it has been decided that the Executive is entitled to the privilege claimed by the Secretary for Air in the instant cases. As we shall see, there have been several cases deciding the contrary, although the question has not heretofore been squarely before this Court.[1] Petitioner, however, cites a number of

1. It was pointed out specifically by Mr. Justice Reed, in the Opinion, and by Mr. Justice Frankfurter in his concurring Opinion, in *Touhy v. Ragen*, 340 U. S. 462, 71 S. Ct. 416 (1951); that this Court was not passing (and had not passed) on the question of whether the head of an executive department could "shut off an appropriate judicial demand" for papers in his custody. The Opinion of the Court states, at 71 S. Ct. 419:

> "We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from

instances in which Congress requested various papers and, upon being refused, dropped the matter without carrying it further. This certainly is slim authority for saying that an Executive privilege existed and *it is none at all for saying that had Congress insisted, the Executive would have been held by the Courts to be the only one entitled to pass upon his own claim of privilege.* The cited instances bear little resemblance to the present case. Most of the demands were made for political reasons. Most of them were made on the President, which explains why they went no further, for although Congress can impeach the President, he cannot as a practical matter be hailed into Court.

Before going further, let us pause for a moment to see exactly what kind of information it was that was requested in these cases. No one doubts that there is at least a qualified privilege in the case of some highly important military and diplomatic secrets. Perhaps some secrets might be imagined of so vital a character, as for example the plans of the atomic bomb, that not even the Judge should be allowed to see them. On the other hand, some representatives of the Government must hold the secret and there is certainly no reason why the members of the Federal Judiciary should not be considered as trustworthy as the representatives of any other branch of the Government. But be that as it may, it is self-evident that before any privilege can be sustained based on an important military secret, there must at least be some specific showing that the disclosure of such a secret is involved.

In the cases at Bar all that was asked was the Air Force investigation report of the accident and the statements of the surviving members of the crew, *in each case*

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making such submission by his superior through Order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers . . . ."

*as to the cause of the accident only.* It has never been claimed that the secret electronic equipment that was being tested on this particular plane had anything to do with the accident. In fact, the proof is to the contrary. In the answers to the interrogatories the only indication of the cause of the accident is that one of the aircraft's engines caught fire and the plane went into a spin (R. 12). In fact, had the Air Force been frank in its answers to Respondents' interrogatories as to the cause of the accident, it might never have been necessary to ask for the investigation report or the statements of the witnesses. The Air Force had the report and it knew the answer. Indeed, the offer of the Air Force (R. 27) to make the surviving members of the crew available so that the Respondents could take their depositions, would seem to be a fair indication that no important military secret was involved *as an effective cause of the accident.*

The Secretary's formal claim of privilege said that the plane at the time was engaged in a secret mission and that it carried confidential equipment (R. 22), but nowhere was it asserted that either had anything to do with the accident. The whole purpose of the demand by the Respondents was for the purpose of finding out what caused the accident in order to establish liability and for that purpose only. They were not in the least interested in the secret mission or equipment. If privilege is claimed on the ground that to comply with the order would result in the disclosure of a military secret, it is too plain for argument that the claim must so assert. Despite the fact that there was no such claim made in the present cases, Judge Kirkpatrick of the District Court amended his original order and directed the Air Force to first submit its report and the statements of the witnesses to him, so that anything confidential could be removed before they were shown to counsel for the Respondents (R. 28). But still the Air Force refused.

That Judge Kirkpatrick's order was the correct procedure is made clear by the language of the Supreme Court

in *Touhy v. Ragen*, 340 U. S. 462, 71 S. Ct. 416 (1951). As quoted in footnote No. 1 in the report of that case, the Attorney General of the United States in the Regulations which he had issued regarding the production of certain files, such as those of the F. B. I., which he regarded as confidential, himself recognized that the proper procedure is to make the Claim of Privilege and then submit the matter to the Court for decision. This, of course, means not merely making the bald claim of privilege, but showing to the Court why it should be granted. Order No. 3229 of the Department of Justice reads in part (340 U. S. 464; 71 S. Ct. 417; Fed. Reg. 4920):

> ". . . If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room."

In commenting upon this, this Court said (340 U. S. 468; 71 S. Ct. 419):

> "We think that Order No. 3229 is valid and that Mr. McSwain in this case properly refused to produce these papers. We agree with the conclusion of the Court of Appeals that since Mr. McSwain was not questioned on his willingness to submit the material 'to the court for determination as to its materiality to the case' and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is not material in this case.

Department of Justice Order No. 3229, note 1, supra, was promulgated under the authority of 5 U. S. C. § 22. That statute appears in its present form in Revised Statutes § 161, and consolidates several older

statutes relating to individual departments. See, e.g., 16 Stat. 163. When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed *or challenged* is obvious." (Emphasis supplied.)

In other words, the function of the Department head when he considers that requested information should not be disclosed, is to "*challenge*" the demand in order that the question of privilege may be decided *by the Court.*

Even should we assume that there may be some information so confidential that not even a Federal Judge may be permitted to see it, at least the burden is upon the Government to explain to the Judge the nature of such information and to offer to supply the non-secret portion. In these cases all that the Air Force had to do was to say to Judge Kirkpatrick, if such was the fact, that its report gave the details of a secret weapon which it did not feel justified in showing to anyone. If it had done this, the Judge would undoubtedly have told them to take that part out and give him the rest. Instead of this, the Air Force refused flatly to show any of the requested documents to anyone. Its sole reason, as the Government now concedes, is that the Secretary feels that it is better for the morale and "housekeeping" arrangements of the Air Force that its reports shall be confidential and consequently that the Courts and everyone else must accept his judgment. "Our central position is that the power of determination is the Secretary's alone." (Petitioner's brief p. 47). On this, therefore, their case must stand or fall.

Judge Kirkpatrick summarized his reasons for denying the Claim of Privilege, as follows (R. 20, 21):

"Again, as in the Alltmont case, supra, the Government does not here contend that this is a case in-

volving the well recognized common law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security.

In effect, the Government claims a new kind of privilege. Its position is that the proceedings of boards of investigation of the armed services should be privileged, in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline. I can find no recognition in the law of the existence of such a privilege. Substantially, this same claim has been considered and rejected in at least two District Court cases, Bank Line Limited v. United States, 68 F. Supp. 587, 76 F. Supp. 801, and Cresmer v. United States 9 F. R. D. 203. The first of these cases was under the Suits in Admiralty Act and the second under the Tort Claims Act, but the privilege claimed was the same in both. I agree with the results of these decisions and conclude that the report and findings in this case are not privileged."

The reason why a mere blanket claim of privilege by the Air Force cannot be sustained, if we are to conform to the American system of government, is well stated by the Court of Appeals for the District of Columbia in the case of *Land v. Dollar Line,* 190 F. (2) 623 (1951). In that case the Secretary of Commerce was held in contempt for refusing to obey a Court order to return the Steamship Company's stock certificates to the owners. The Court said (pp. 638, 639):

"The matter reaches to bedrock. The initial premise of the American form of government is that the rights of life, liberty and property are inherent in the people. The Government was established by the people, and its powers were enumerated in a written document. The Government has no other powers. In

order that neither the legislature nor the executive might exceed those conferred powers, a third, co-equal branch of government was established. It was not necessary to make the judiciary a co-equal branch of government in order to provide a tribunal for the adjudication of ordinary disputes between citizens; in almost all governments there are courts for that purpose. But it was necessary to make it such a third branch in order that there might be a tribunal with power to determine whether specific acts of the legislature or of the executive are within the powers conferred by the people in the written document.

It is absolutely true that if an act be within the powers conferred upon the legislature the judiciary cannot interfere with it in any fashion; and, similarly, if an act be within the power of the executive the judiciary cannot coerce it, restrain it, or interfere with it in any degree. *But some authority must determine whether a specific act is within the official capacity of the executive and so immune from interference. That authority is the judiciary.* That question is a justiciable issue. The Constitution put the power of determination of such a question in the judiciary, because it was necessary to put it there. It being necessary in the scheme of a constitutional government to have an authority to decide such a question, the authority to be effective had to be lodged in a separate independent branch of the government co-equal with the branches over whose activities it was to have this power.

(The officials) say that, even though the courts determine that a specific action is not within the official capacity of an executive officer, he is immune from compulsion by the courts in respect to that action. That is to say that the executive can determine for himself whether the acts of his subordinate officials are within or without their official capacities. That

proposition asserts the impotency of the judiciary as an organ of government." (Emphasis supplied.)

The exact question involved in the present cases was resolved in favor of plaintiff in the case of *Cresmer v. United States*, 9 F. R. D. 203 (U. S. D. C., E. D. N. Y., 1949). In that case the plaintiff's intestate had been killed in the crash of a Navy plane, and an action for wrongful death was brought against the United States under the Federal Tort Claims Act. The plaintiff, proceeding under Rule 34 (as in the instant cases) filed a motion for an order directing the United States to produce for inspection and copying the report of the Navy Board of Investigation into the flight and crash which were the subject of the action. The motion was opposed, as here, on the ground that the report was privileged. The court, after considering the problem with great care, made a preliminary examination of the report to make sure that it contained no vital secrets, and then ordered its production, District Judge Galston stating, at page 204:

"The motion is opposed on the ground that the report is privileged. On the argument of the motion I said from the Bench that the Federal Tort Claims Act places the United States in respect to claims dealt with by the Act on a par with private litigants. So it was held in Wunderly et al. v. United States, 8 F. R. D. 356. However, to make sure that the report in question contained no military or service secrets which would be detrimental to the interests of the armed forces of the United States or to the National security, I requested counsel to produce the report for my examination. I have read it and I see nothing in it which would in any way reveal a military secret or subject the United States and its armed forces to any peril by reason of complete revelation.

* * *

> *In the absence of a showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed forces, or any threat to the National security,* it would appear to be unseemly for the Government to thwart the efforts of a plaintiff in a case such as this to learn as much as possible concerning the cause of the disaster." (Emphasis supplied.)

The case of *Wunderly v. U. S.* referred to in the above quotation was decided by Judge McGranery on the authority of Judge Kirkpatrick's decision in *O'Neill v. U. S.*, 79 F. Supp. 827 (1948) discussed *infra* at page 32.

Essentially the same problem was presented in *Bank Line, Ltd. v. United States*, 68 F. Supp. 587 (U. S. D. C., S. D. N. Y., 1946); 163 F. (2) 133 (U. S. C. A. 2). (See also supplemental opinion of the District Court in 76 F. Supp. 801.) That case involved a collision between plaintiff's vessel and a vessel owned by the United States. The libellant, proceeding under Admiralty Rule 32, which is substantially the same as Rule 34 of the Federal Rules of Civil Procedure, moved in the District Court for an order to produce for inspection and copying a transcript of the hearing before the Naval Board relating to the collision. The situation in the *Bank Line* case was identical with that in the cases at Bar with the exception that it involved the Navy instead of the Air Force. In the *Bank Line* case the Navy objected, just as the Air Force did here, to the granting of the Motion for the production of the report of its investigation on the ground that it had been held solely for naval purposes and because of the need for disciplinary action. It submitted in support of its claim of privilege a written statement by the Judge Advocate of the Navy asserting that the record of the Board of Investigation was privileged. This was supplemented by a communication from the Secretary of the Navy saying that the Department "is of the view that an inability to conduct an investigatory

proceeding into its own administration, without the record becoming available to litigants, if the matter should become involved in litigation, will greatly hamper the effective functioning of the Navy Department and is prejudicial to its best interests." Hence, said the Secretary of the Navy, he considered the compulsory production of records of naval investigations not in the public interests. All of this is exactly the position of the Secretary for Air in the present cases. The Court, nevertheless, made an order granting the motion, except for such portions of the report before the Naval Board as dealt only with disciplinary action. The United States thereupon filed a petition in the Court of Appeals for a writ of prohibition against the District Court from taking steps to enforce its order to produce the report of the naval investigation. The Court of Appeals denied the Government's petition and stated that in making a claim of privilege it is for the Government to show why the information requested should be privileged. Judge Clark in his concurring opinion said (p. 139):

> "Second, I think we should avoid any implication of a suggestion that the Navy has, as yet, shown fully adequate grounds for refusing discovery. Certainly for the conduct of war and for purposes of national defense the proper heads of our armed forces may make a decision of the need of concealment, which the courts must respect; but I think no general principle of refusing discovery on a general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces. Here we are dealing with matters of a war now closed, i.e., with matters of history; could the Navy refuse information in its files as to the development of the Monitor on a present claim of privilege? We are not at war now, and I do not believe it will aid and comfort some unknown potential enemy if the Navy now states why concealment of specific information is material to national defense."

Although a B-29 airplane is of more recent vintage than the Monitor, it is nonetheless a type of aircraft which has been many times declared by our military leaders to be obsolete. It is a well-known fact that several of them were obtained intact by the Soviet Government during World War II and never returned to the United States. In fact, a present-day Russian heavy bomber is a copy of the B-29. If the Secretary for Air is of the opinion that there really is anything still secret about the construction or operation of a B-29 which it would not be in the public interest to disclose, he certainly should at least be required to give to the Court the benefit of his reasons for so thinking.

The same rule was applied in *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (U. S. D. C., W. D. La., 1949), where the court held that the United States cannot determine for itself, in a civil action under the anti-trust laws, whether or not certain documents in its possession, including F. B. I. reports, are privileged. From the following quotation from the opinion it will be seen that the way in which the question arose and the action of the Court were the same as in the cases at Bar except that in the *Cotton Valley* case, the United States was the plaintiff. Chief Judge Dawkins of the District Court of Louisiana said (p. 720):

> ". . . counsel for the Government appeared and submitted further authorities as to the right of the Attorney General to claim and for himself determine the question of privilege as to the documents called for in the motions to produce. Thereupon, after considering said cases, the court stated from the Bench that to sustain this contention, would in effect, amount to an abdication of the court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the court, with such claims as to privilege as the Attorney General desired to make, they would be considered before

allowing opposing counsel to see them and if it appeared, in the court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded; otherwise, the order to produce for the inspection of defendants would be sustained. This, having been declined, counsel was told that a reasonable time would be allowed for further consideration, and the latter, stating no additional time was desired, the court announced that the only course left was to dismiss the complaint for failure to comply with its orders. . . . "

On appeal to this Court, the decision was affirmed per curiam by a divided Court. See 339 U. S. 941, 70 S. Ct. 793 (1950).

What Judge Kirkpatrick said in *O'Neill v. U. S.*, 79 F. Supp. 827 (1948) is equally appropriate when applied to the instant cases (p. 830):

". . . Certainly the right accorded to seamen to sue the government by the Suits in Admiralty Act would be of very little value if the government could in its character as sovereign refuse to comply with any order of the Court in procedural matters without incurring any penalty or disadvantages."

There is a full discussion of the subject in *Wigmore on Evidence*, 3rd Ed., Vol. VIII, Section 2367, et seq. Wigmore recognizes the need for secrecy in certain cases involving diplomatic and military secrets, but beyond this he feels strongly that there is no such need. He says (§ 2378a, pp. 789-790):

"The question is then reduced to this. Whether there are any matters of fact, in the possession of officials, concerning *solely the internal affairs of public business*, civil or military which ought to be privileged from disclosure when material to be ascertained upon an issue in a court of justice?

1. Ordinarily, there are not. In any community under a system of representative government and removable officials, there can be no facts which require to be kept secret with that solidity which defies even the inquiries of a court of justice. 'To cover with the veil of secrecy,' said Patrick Henry, 'the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country.' Such a secrecy can seldom be legitimately desired. It is generally desired for the purposes of partisan politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. Whether it is the relations of the Treasury to the Stock Exchange, or the dealings of the Interior Department with public lands, the facts must constitutionally be demandable, sooner or later, on the floor of Congress. To concede to them a sacrosanct secrecy in a court of justice is to attribute to them a character which for other purposes is never maintained,—a character which appears to have been advanced only when it happens to have served some undisclosed interest to obstruct investigation into facts which might reveal a liability.

2. It is urged, to be sure (as in Beatson v. Skene), that the 'public interest must be considered paramount to the individual interest of a suitor in a court of justice.' As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. 'Necessity,' as Joshua Evans said, 'is always a suspicious argument, and never wanting to the worst of causes.'

* * *

> . . . After guaranteeing to official communications and acts an immunity from liability to civil or criminal consequences, and after further eliminating those acts and communications which are in no sense secret from their inception, what remains of real and intrinsic secrecy of transaction? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy in all official acts and records, has commonly been only a canting appeal to a fiction. It seems to lend itself naturally to mere sham and evasion."

To the same effect, see *Moore's Federal Practice*, 2nd Ed., Vol. 4, pp. 1180-1182.

Judge Maris characterized the Government's position as follows (R. 53):

> "Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity from disclosure which one government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities."

Even should we assume again, as the Petitioner does without benefit of authority, that at one time there may have been some sort of a common law special privilege in

the Government which was not possessed by private individuals, why talk about what the common law used to be when we now have a statute changing it? Clearly Congress had the right to pass a law doing away with any such special privilege, just as it had the right to do away with the Government's immunity from suit, and when the Chief Executive approved such a law, that ended the privilege both for himself and all minor executives. This Court has held that the Federal Tort Claims Act means what it says when it provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." In *United States v. Yellow Cab Company*, 71 S. Ct. 399; 340 U. S. 543 (1951), the question was whether the Government, having consented to be sued in tort, had agreed not only that it might be sued directly, but also that it might be brought in as a joint tort-feasor under the practice set up in the Federal Rules. This Court, speaking through Mr. Justice Burton, said (71 S. Ct. 403):

> "On its face the Act amply covers such consent. Section 410(a) waives immunity from suit on—'*any claim* against the United States, for money only, accruing on and after January 1, 1945, *on account of* damage to or loss of property or *on account of* personal injury or death *caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this title, *the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances,* except that the United States shall not be liable for interest prior to judgment, or for punitive damages,

• • •" (Emphasis supplied [by the Court].) 60 Stat. 844, 28 U. S. C. (1946 ed.) § 931(a).

The words *'any claim* against the United States • • • *on account of* personal injury' (emphasis supplied [by the Court]) are broad words in common usage. They are not words of art.

• • •

(p. 404)

It suggests no reason for reading into it fine distinctions between various types of such claims.

• • •

Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements.[8]"

• • •

(p. 406)

This brings the instant cases within the principle approved in United States v. Aetna Casualty & Surety Co., 338 U. S. 366, 383, 70 S. Ct. 207, 216:

'In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. John L. Hayes Construction Co., 243 N. Y. 140, 147, 153 N. E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."'

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8. ". . . The District Court procedure is expressly made subject to the Federal Rules of Civil Procedure, 28 U. S. C. A., rather than to the Tucker Act."

> . . . As applied to the State of New York, Judge Cardozo said in language which is apt here: 'No sensible reason can be imagined why the state, having consented to be sued, should thus paralyze the remedy.' Anderson v. John L. Hayes Const. Co., 243 N. Y. at page 147, 153 N. E. at page 29. 'A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. • • • When authority is given, it is liberally construed.' United States v. Shaw, 309 U. S. 495, 501, 60 S. Ct. 659, 661, 84 L. Ed. 888."

It is indeed a hollow gesture for the United States to waive its immunity from suit, if it may then suppress the evidence necessary for the proof of the plaintiff's case. To permit such a result would be analogous to allowing the Government, where it is the prosecutor in a criminal case, to withhold under a claim of privilege evidence material to the proof of the defendant's innocence. For many years the Courts have held that in such criminal cases the Government has the choice of either waiving its privilege or letting the alleged offense go unpunished.[2] Similarly, in the instant cases, since the United States has seen fit to close the door to the plaintiffs' sole source of information as to the cause of the accident, it is only just that it should not be permitted to itself introduce evidence to controvert the fact of its own negligence.

It is clear that any power claimed for the Executive Branch of the Government must be based upon an Act of Congress or a provision of the United States Constitution. This premise and the nature of the power of the executive

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2. See *United States v. Andolschek*, 142 F. (2) 503 (1944) (C. A. 2); *United States v. Beckman*, 155 F. (2) 580 (1946) (C. A. 2).

was made clear by this Court in its very recent decision—*Youngstown Company v. Sawyer*, 72 S. Ct. 863 (1952). In that case this Court flatly rejected the claim that the President of the United States had inherent power and authority to seize and operate private steel mills, stating at 72 S. Ct. 866:

> "The President's power to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied . . ."

In the instant case Petitioners have not cited any act of Congress or Constitutional provision giving the Secretary for Air the authority claimed for him.

It is no answer to say that that R. S. 161, 5 U. S. C. 22 authorizes the head of each executive department to prescribe regulations for its clerks, the performance of its business and the use of its records, etc. and consequently, since the Secretary for Air has promulgated Air Force regulations prohibiting the disclosure of records without his approval, no one is entitled to see an Air Force record unless the Secretary permits. It is only necessary to read R. S. 161 (quoted on p. 75 of Petitioner's brief) to see that all it purports to do is to give to the various executive heads authority to make rules for the running of their respective departments, just as any State or corporate official must have authority to establish rules for the operation of the division of which he is in charge, if it is to operate efficiently. Obviously, such authority cannot be stretched so as to include the right of the department head to make rules affecting others outside of his organization and then elect himself the sole judge of their enforcibility. R. S. 161 itself says that the head of each department is authorized to prescribe regulations "*not inconsistent with the law.*"

**Authorities Relied Upon by the Petitioner.**

Petitioner relies upon the cases of *Boske v. Comingore*, 177 U. S. 459 (1900) and *Touhy v. Ragen*, 340 U. S. 462, 71 S. Ct. 416 (1951). One distinction between the *Boske* case and the instant case which is of importance is that in the former the Government was not a party to the litigation so that it had not agreed that a suit might be brought against it as though it were a private litigant and that it should be subject to the Federal Rules. The *Touhy* case involved the right of a subordinate official of the Department of Justice to refuse to obey a subpoena duces tecum ordering the production of certain papers of the Department in his possession. The basis of the refusal was a Regulation issued by the Attorney General under Revised Statutes 161, 5 U. S. C. § 22, just as in the cases at Bar the refusal of the Secretary for Air is based upon Regulations issued by him under the same authority. The subordinate official in the *Touhy* case was found guilty of contempt by the District Court. The Court of Appeals for the 7th Circuit reversed upon the ground that the subordinate was asked to make an unlimited disclosure which the Attorney General had forbidden without a prior determination by the Court of whether such disclosure was in the public interest. The Supreme Court affirmed purely on the ground that the Attorney General could forbid disclosure *by a subordinate* and hence the subordinate could not be held in contempt for merely doing what he was told by his superior. Both Justice Reed, who wrote the opinion, and Justice Frankfurter in his concurring opinion, expressly pointed out that the question of the extent of the Attorney General's privilege against disclosure was not at issue. Justice Frankfurter said (340 U. S. 471; 71 S. Ct. 421):

> "'This case,' the Court holds, 'is ruled' by Boske v. Comingore, 177 U. S. 459. I agree. Boske v. Comingore decided that the Secretary of the Treasury was authorized, as a matter of internal administration in

his Department, to require that his subordinates decline to produce Treasury records in their possession. In the case before us production of documents belonging to the Department of Justice was declined by virtue of an order of the Attorney General instructing his subordinates not to produce certain documents. The authority of the Attorney General to make such a regulation for the internal conduct of the Department of Justice is not less than the power of the Secretary of the Treasury to promulgate the order upheld in Boske v. Comingore, supra.

But in holding that that decision rules this, the context of the earlier decision and the qualifications which that context implies become important. The regulation in Boske v. Comingore provided: (1) that collectors should under no circumstances disclose tax reports or produce them in court, and (2) that reports could be obtained only 'on a rule of the court upon the Secretary of the Treasury.' 177 U. S. at 460-461. The regulation also stated that the reports would be disclosed by the Secretary of the Treasury 'unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy.' Ibid. *This portion of the regulation was not in issue, however, for the Court was considering the failure of the collector to produce, not the failure of the Secretary of the Treasury.* This is emphasized by the Government's suggestion that:

> 'If the reports themselves were to be used this could be secured by a subpoena duces tecum to the head of the Treasury Department, or someone under his direction, who would produce the original papers themselves in court for introduction as evidence in the trial of the cause.' Brief for Appellee, p. 49, Boske v. Comingore, supra.

And the decision was strictly confined to the narrow issue before the Court. It is epitomized in the concluding paragraph of the Boske opinion:

> 'In our opinion the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.' 177 U. S. at 470.

*There is not a hint in the Boske opinion that the Government can shut off an appropriate judicial demand for such papers.*" (Emphasis supplied.)

Applied to the present cases this simply means that the Secretary for Air was entirely within his rights in promulgating a Regulation that accident reports should not be released without his approval, but that does not mean that he himself can refuse a proper judicial demand without proving to the satisfaction of the Court that the refusal is justified.

The Petitioner points to a number of historic instances in which different Presidents of the United States are said to have refused to produce certain information. The principal cases referred to are *Marbury v. Madison*, 1 Cranch 137 (1803) and *Burr's Trials*. *Marbury v. Madison* was an action of mandamus to require James Madison, as Secretary of State, to deliver to Marbury a commission as Justice of the Peace in the District of Columbia, which had been signed by President John Adams but which Marbury had never received. Obviously, there was no question at issue such as that in the present cases. In the course of the argument Attorney General Lincoln was called as a witness and the Supreme Court said that he should answer the questions asked but that he was not bound to disclose

anything which had been communicated to him in confidence. In other words, confidential matters such as those between attorney and client, physician and patient, etc. should be respected, as indeed Federal Rule 34 specifically provides for when it says that the Court may make an order for the production of documents, etc. "not privileged". What this Court in effect said in the *Marbury* case was that upon a showing by Mr. Lincoln to the Court that he had information which was confidential, *the Court* would not compel him to answer. This is certainly no authority for the proposition that even in that day, long before the Government had waived its immunity from suits for damages and had agreed that it might be treated in such cases exactly like a private individual, the head of a department could refuse to disclose even to the Court anything which he alone felt that the morale of his department required should be kept secret.

It is said (Petitioner's brief p. 32) that in *Burr's* trial Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent to him by John Wilkinson and that Jefferson ignored the subpoena. An examination of the report of the trial in 1 Robertson's Reports, shows that this is not the fact. Jefferson furnished all of the documents demanded except one letter from General Wilkinson and he left it to Government counsel to withhold "communication of any parts of the letter which are not directly material for the purposes of justice." (1 Robertson's Rep. p. 210). Government counsel emphasized that he was willing to disclose the entire letter to the Court and leave it to the Court to suppress so much as was not material to the case. It is implicit throughout Chief Justice Marshall's opinion in the *Burr* case that where such a claim of privilege is made, the reason should be shown to the Court, and he in fact asserted the power of the Judiciary to determine whether an executive claim of privilege had merit. For an up-to-date and most interesting discussion of this whole question, in-

cluding the historical background of Governmental claims of privilege, see the article in the December, 1950 issue of the Yale Law Journal entitled "Government Immunity from Discovery", *59 Yale L. J. 1451.*

Great stress is laid (Petitioner's brief pp. 38-42) upon the English case of *Duncan v. Cammell, Laird & Company, Ltd.*, 1942 A. C. 624. That case grew out of the sinking on her trial test of the new British submarine "Thetis", with heavy loss of life. The Crown was not a party to the litigation and discovery was sought of documents which included the plans and specifications of the vessel. Obviously, this was a case of military secrets, which have always been considered highly confidential and privileged. Although the opinion does say that an objection to the production of documents by the head of a Government department on the ground of public interest is conclusive, this was not necessary to the decision since the objection of the Admiralty in this case had been made subject to the order of the court. This appears from the opinion, where the House of Lords said (1942 A. C. at p. 642):

> "Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce 'except under the order of this honourable court.' It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed."

Judge Maris' comment upon the *Duncan* case was (R. 56):

> ". . . For whatever may be true in Great Britain the Government of the United States is one of checks

and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established. Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision."

Another distinction between the British rule and that in the United States is that in England, although the Crown may be sued, there is no Tort Claims Act saying that the Government shall be liable under the same circumstances as a private individual, nor was there at the time of the *Duncan* case anything comparable to our Federal Rules. And it is interesting to note that when the Crown Proceedings Act, 1947, 10 & 11 Geo. 6, C. 44, § 28, was passed, for the first time expressly authorizing discovery against the Crown, it specifically exempted any document which *in the opinion of the Minister*, it would be injurious to the public interest to disclose.

The quotation from *Duncan v. Cammell, Laird & Company*, given in Note 23 on pp. 40-41 of Petitioner's brief, is interesting in that it shows clearly that even in England the ground upon which the Government's claim of privilege is based in the instant cases would not be recognized. As the Lord Chancellor said:

". . . Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced."

Frequent reference is made to Air Force Regulation No. 62 (quoted on pp. 78 to 81 of Petitioner's brief), which provides that witnesses before an Air Force Investigation

Board shall be told that reports will not be used in connection with disciplinary action, determination of pecuniary liability, or line-of-duty status or reclassification.

The contention is that since the investigation is made upon an assurance given to the witnesses that it will not be used against them, disclosure would violate this promise, would hinder future investigations and break down the morale of the Air Force. The obvious meaning of the language of the Regulation to the effect that the report will not be used in any proceeding "toward disciplinary action, determination of pecuniary liability or line-of-duty status, or reclassification", is that it will not be so used *against the witnesses.* The purpose is to get at the true facts without having anything held back. To say that witnesses who are themselves immune, will not tell the truth just because their statements may show that the Government should compensate the relatives of persons who have been carelessly killed, is a complete non sequitur.

Petitioner's next contention (brief pp. 45, 46, 49 & 50) is that since Congress as far back as 1910 in the Interstate Commerce Act (36 Stat. 351, 45 U. S. C. 41) and again in 1938 in the Civil Aeronautics Act (52 Stat. 1012, 49 U. S. C. 581) provided that reports of investigations conducted by these bodies should not be admitted in evidence or used for any purpose in any suit for damages growing out of the matter investigated, therefore the failure to make a similar provision covering Air Force investigations must have been an oversight. As Judge Maris pointed out, the natural conclusion is exactly the reverse. He said (R. 52, 53):

> ". . . Where, as here, the United States has consented to be sued as a private person, whatever public interest there may be in avoiding any disclosure of accident reports in order to promote accident prevention must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is

done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States. When Congress has desired to bar the admission of airplane accident reports in evidence it has known how to do so, and it has also known how to give to department heads discretionary power to refuse to produce records in suits brought against the United States. It has done neither in connection with suits under the Federal Tort Claims Act."

## II. The Power of the District Court to Enter Judgment.

In the Circuit Court the Government argued that the District Court, by its order that the plaintiffs need produce no further proof of the negligence of the defendant and that the United States should not be permitted to introduce evidence controverting the negligence, violated Rule 55(e) [3]

3. The draftsmen of the Federal Rules of Civil Procedure were careful to state in Rule 55(e) that judgment by default should not be entered against the United States, and also to make special provisions relating to the United States in other sections of the Rules, such as those providing the time for the filing of pleadings, etc. This shows clearly that in all cases in which it was intended that there should be a difference in the application of the Rules to the United States, as distinguished from a private individual, the draftsmen of the Rules were careful to specifically so provide. If it had been intended that the orders covered by Rule 34 should not apply to the Government, we could have consistently expected to find at the end of that Rule another sentence reading somewhat as follows:

"Provided, however, that no such order shall be made against the United States in any case in which it shall have filed a claim of privilege."

In any event, even if an actual judgment by default had been entered against the Government under Rule 55(e), it would have fallen within the exception in that Rule with respect to such judgments against the United States. The Rule says "No judgment by default shall be entered against the United States or an officer or agency thereof *unless the*

forbidding judgment by default against the United States. Although Petitioner's present brief is not entirely clear on this subject, we understand that it has now abandoned this contention. Nevertheless, it is argued that the District Court, by applying the sanctions under Rule 37(b)(2), has in some way circumvented Rule 55(e) against the entry of judgment by default against the United States.

The answer is that all that the District Court did was to enter an order exactly as provided in Rule 37(b)(2) which this Court has said in the *Yellow Cab* case, and Government counsel now admit, is applicable to the United States. The Secretary's alleged privilege was not violated by compelling him to produce the documents. He was simply subjected to the procedural limitations provided by the Rules for his failure to obey the Court's order, precisely, in the language of the Federal Tort Claims Act, "in the same manner and to the same extent as a private individual under like circumstances". Just as in the case of any other

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*claimant establishes his claim or right to relief by evidence satisfactory to the Court.*". In the present cases the Respondents' claims were established by evidence. As we have seen, under the pleadings and the answers to the interrogatories, it was admitted that the airplane was owned, operated and controlled exclusively by the United States. It was further admitted that an engine took fire and the plane went into a spin and crashed. The deaths having occurred in Georgia, the cases are governed by the law of that State, which is that where the instrumentality in question is shown to be under the management of the defendant or its servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, this in itself affords reasonable evidence of negligence. *Macon Coca-Cola Bottling Co. v. Crane*, 55 Ga. App. 573; 190 S. E. 879; *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443 and 119 Ga. 837, 47 S. E. 329. It therefore follows that inasmuch as the record contained evidence of the negligence of the United States, the Trial Judge would not have been prevented by the provisions of Rule 55(e) from entering judgment by default.

litigant, the Secretary for Air had his choice whether to produce or to have one of its defenses taken away from the Petitioner as defendant in these cases. The Secretary made his choice and must abide the result.

This same question was passed upon by Judge Kirkpatrick in *O'Neill v. U. S.*, 79 F. Supp. 827 (1948). That case involved the plaintiff's demand for production of the statements of witnesses taken by the F. B. I. in connection with a suit by a seaman against the United States under the Suits in Admiralty Act, 46 U. S. C. A., Section 741, et seq., for injuries incurred on a Government vessel during World War II. The Court was applying Admiralty Rule 32(c), which is the counterpart of Rule 34 of the Federal Rules of Civil Procedure. The Attorney General of the United States objected to the production of the statements upon the ground of privilege. Because of the Government's failure to comply with its order to produce, the Court entered an order refusing to allow it to oppose the libellant's contention that his injury was due to negligence on the part of the personnel of the vessel in question. Judge Kirkpatrick said (p. 830):

> "Nor can it be said that the remedy asked for amounts to compulsion under another form. True, if the Attorney General refuses to make the disclosure the government will incur certain procedural disadvantages by way of penalty and may lose its case, but it is the government that is being sued, not the Attorney General, and the government has consented. When it enacted the Suits in Admiralty Act, Congress was in essence authorizing the payment out of the Treasury of money upon judgments obtained in such suits. It was entirely within the constitutional powers of Congress to set up any procedure it pleased by which a suitor in such case could obtain a judgment. It could have curtailed or eliminated defenses, or handicapped the government procedurally in any manner. Actually, it

went no further than to provide that certain omissions and defaults in the course of a suit would have the same effect in the case of the government as in the case of a private litigant.

* * *

In applying the sanctions by Rule 32C for refusal to make disclosure the Court has a wide discretion. The libellant in this case has asked for judgment by default. I do not think that in the present case this remedy is appropriate. Although Rule 55(e) of the Rules of Civil Procedure, providing that no default shall be entered against the United States unless the claim for relief is established by satisfactory evidence, does not apply to admiralty proceedings, I think the policy of the Rule is generally sound and is particularly applicable to a case like the present. I think that it would be proper to make an order refusing to allow the government in this case to oppose the libellant's claim that his injury was due to negligence on the part of the personnel of the Cedar Mills or the unseaworthiness of the vessel, or both."

The weakness of the Petitioner's position is illustrated by the fact that it is finally reduced to saying in effect (brief pp. 66-67), that even if it may be all right to force the Government to make its election whether to abide by the Rules or suffer the penalties which they provide in a case in which the Government is the claimant, it is highly improper to compel it to elect between disclosing or foregoing a defense where the action is brought against it. It is difficult to understand wherein lies the difference between an order which may result, on the one hand, in the Government's being unable to collect a claim, and upon the other, one which leads to a judgment against it. Certainly the "public interest" is the same in either case.

**III. Respondents Showed "Good Cause" Under Rule 34.**

The accident out of which these cases arose was the crash of an airplane owned, maintained and operated by the United States. Out of thirteen men on board, only four survived. One was a civilian engineer like the Respondents' decedents, who was on the plane only for the purpose of testing certain electronic devices which the Government does not claim had anything to do with the operation of the plane or the cause of the accident. This civilian survivor could therefore not be expected to have any expert knowledge of why the accident happened. The other three survivors were all Air Force personnel—Captain Moore, Co-Pilot, and Sergeants Peny and Murrhee (R. 12, 13). The Government concedes that it took written statements from each of these three men immediately following the accident and, further, that it conducted an investigation by a board of experts, who made a written report of their findings as to the cause of the accident. The answers to Interrogatories 1 and 5 so state and admit that the Air Force obtained statements as to the events leading up to the crash, the mechanical condition of the plane immediately prior thereto, and the cause of the accident (R. 7, 8, 9, 11, 12).

It is a well known fact that where an accident occurs to an Air Force plane, no one other than Government personnel is allowed access to the wreckage. And, in any event, by the time that the Respondents were able to employ counsel and make their demands for discovery, what little there was left of the plane had been removed and was unavailable.

We do not contend that it is not necessary under Rule 34 for the moving party to show "good cause" in order to be entitled to discovery. The Rule says so. What we do contend is that not only has "good cause" been shown, but that it is inherent in the very nature of the present cases.

It was alleged without contradiction that the Respondents had no knowledge of the cause of the accident and no way in which to obtain it other than from the Government

personnel on the plane and the report of the Air Force investigation (see paragraph 5 of plaintiffs' Motion for Production of Documents, R. 15, 16). How could the plaintiffs possibly know and how else could they find out? If there was ever a case in which a plaintiff had "good cause" for the production of documents, this is it.

The documents which the Petitioner refused to produce were of two kinds—one, the statements of the three surviving members of the crew of its plane, taken immediately after the accident, and, second, the report of its investigating Board of Experts. We understand that Government counsel do not now contend that "good cause" was not shown for the production of the latter inasmuch as they never offered to produce it in any form. Upon the contrary, the Petitioner seeks to justify its refusal as to the report solely upon the ground of privilege. Consequently, if the Court finds that the report was not privileged in the sense contended for by the Secretary, the question of "good cause" becomes moot, inasmuch as the District Court's order was justified in any event because of the refusal to produce the report.

The Petitioner contends that because it offered to produce the witnesses so that their depositions could be taken,[4]

4. Even this gesture was a qualified one. The affidavit of the Judge Advocate General says (R. 27) "That these witnesses will be authorized to testify regarding all matters pertaining to the cause of the accident *except as to facts and matters of a classified nature.*" (Emphasis supplied.) What does this exception mean? What is it that the Government is reserving the right to hold back? The Secretary for Air in his claim of privilege states (R. 22) that "any disclosure of its (the airplane's) mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest." In the light of this all-inclusive claim of privilege, it is obvious that the Air Force considers that all details concerning the operation of the airplane are "classified," and that the information, if any, obtained by deposition would have been no more substantial than that which

this made the written statements taken from these witnesses immediately after the accident unnecessary, thereby demonstrating that there was no "good cause" shown for the production of the statements.

In answer to this we cannot improve upon Judge Kirkpatrick's summary, in which he says (R. 19, 20):

> "However, assuming that it is possible to take the depositions of the witnesses in question without undue burden upon the plaintiffs, the fact remains that, in view of the nature of this particular case, disclosures of the contents of their written statements is necessary to enable the plaintiffs to properly prepare their cases for trial, and furnishes good cause for production.
>
> The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board's investigation undoubtedly contain facts, information and clues which it might be extremely difficult, if not impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors.

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was obtained by the interrogatories under Rule 33. It is clear that had Respondents attempted to obtain an order from the court compelling further answers to interrogatories or depositions, the Government would have made a similar claim of privilege.

I am not suggesting that the witnesses on deposition would not answer the questions asked them truthfully but, in a case like this, in which seemingly trivial things may, to the expert, furnish important clues as to the cause of the accident, the plaintiffs must have accurate and precise first-hand information as to every relevant fact if they are to conduct their examination of witnesses properly and to get at the truth in preparing for trial. This only the statements can give them. I would not go so far as to say that the witnesses would necessarily be hostile. However, they are employees of the defendant, in military service and subject to military authority and it is not an unfair assumption that they will not be encouraged to disclose, voluntarily, any information which might fix responsibility upon the Air Force.

The answers to the interrogatories are far short of the full and complete disclosure of facts which the spirit of the rules requires. True, the defendant has produced a mass of documents but these refer to the past performance of the plane and service records of the pilots and are essentially negative. When it comes to the interrogatory 'Describe in detail the trouble experienced', the answer is, 'At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. 1 engine.' Obviously the defendant, with the report and findings of its official investigation in its possession, knows more about the accident than this.

Beside all this, the accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds. Even in simple accident cases requiring no technical knowledge to prepare for trial, the fact that a long period of time has elapsed between the accident and the taking of the deposition of a witness gives a

certain unique value to a statement given by him immediately after the accident when the whole thing was fresh—particularly when given to an employer before any damage suit involving negligence has begun."

It is argued that Rule 34 should not have been applied until after interrogatories, depositions and pre-trial conferences had been exhausted. We filed interrogatories and the answers very carefully avoided giving any real information about the cause of the accident. There were several conferences prior to the order under Rule 34 and they were equally barren of results. So far as depositions were concerned, with absolutely no knowledge of what caused the accident to start with, how else could counsel for the Respondents know how to examine intelligently the witnesses either at the trial or upon depositions, unless he could see their statements given immediately after the accident with no thought of litigation in mind, and unless he could also see the report of the Air Force Investigating Board. When an accident is long past, it is so easy for an unwilling witness, with no fear of a written statement to check him, to give the time-worn answer "I don't remember".

Furthermore, the Respondents had intended at the trial to call an aviation expert as a witness upon their behalf. Obviously, for such a witness to be useful it is essential that he should be put in possession in advance of trial of all the facts and technical details having to do with the accident.

There have not been many decisions on the narrow question of what constitutes a showing of "good cause", and even such as there are do not attempt to lay down a definite test. The reason, of course, is that each case must depend on its own facts and, as the Trial Judge pointed out in his opinion (R. 18): "Concededly, in determining what amounts to good cause under Rule 34, the trial court has a wide discretion."

In any case where the party seeking discovery shows a real need for discovery, the cases hold that good cause is established and discovery will be granted. Thus, in *Thomas v. Pennsylvania R. R. Co.*, Dist. Court, E. D. of N. Y., 7 F. R. D. 610 (1947), the Court ordered the defendant to produce written statements of its witnesses, where it appeared that the credibility of the witnesses would be of material importance at the trial. This was done even though the plaintiff had already taken their depositions.

In *Canister Co. v. National Can Corp.*, U. S. Dist. Court of Delaware, 8 F. R. D. 405 (1948), the Court held that good cause for production of documents was shown by defendant in the averment under oath that the writings might contain facts whereby defendant might be able to minimize the amount of plaintiff's alleged damages.

In *Lindsay v. Prince*, D. C., N. D. of Ohio, W. D., 8 F. R. D. 233, (1948), the Court held that good cause had been shown for the production of statements of witnesses where it was shown by affidavit that the moving party had been unable to obtain any information about the accident.

In *Electric Furnace Co. v. Fire Association of Phila.*, U. S. District Court, N. D. of Ohio, 10 F. R. D. 152 (1950), the Court ordered the production of all the reports containing the results of defendant's investigation, even though plaintiff had already obtained summaries of these reports by means of interrogatories. The Court pointed out that under the Rules the plaintiff is entitled to complete and exhaustive discovery, and stated (p. 153):

> "No case has been found which deals directly with the question here presented, but there are some cases which are closely analogous. In Bruun v. Hansen, D. C. 30 F. Supp. 602, it was held that the fact that the party seeking discovery of documents had learned of their contents by a bill of particulars did not prevent the discovery of the documents; and in Leach v. Grief Bros., D. C., 2 F. R. D. 444, it was held that the fact

that both parties had the information contained in the desired documents would not prevent their discovery, because if both side had the documents, lengthy cross-examination would be avoided, and perhaps some of the issues might be eliminated. The production of the reports in this case will have the same effect. If plaintiff can examine the documents, it may be it will decide that defendant had no independent knowledge of the loss sustained by plaintiff, and thus eliminate one issue entirely, and probably shorten cross-examination considerably.

Furthermore, use of one of the Rules such as 33, does not preclude use of all the others, such as 34. They are of course somewhat related but unless complete and exhaustive disclosure of every facet of information has been obtained by one of the rules, a party may choose to abandon one method of discovery and follow the procedure under another rule which he believes will afford greater disclosure of material facts. The rules are pretty broad where information is sought.

In this case plaintiff has by use of interrogatories discovered some very relevant information contained in certain reports. However revealing this information is, it still is an edited (no doubt carefully) summation of the reports by the defendant. Since the reports as shown by the answers to the interrogatories do contain information relevant to plaintiff's claim, it would seem that plaintiff ought not to be made to rely on defendant's interpretation of the reports but should be given an opportunity to view the reports in their entirety.

The case of Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451, is not controlling here. In that case complete and exhaustive discovery had been had, which is not clearly evident in this action. Since plaintiff is entitled to the information, and since it is relevant to the issues of this action, and it cannot be

obtained except by use of this rule, it is my conclusion that good cause has been shown and the motion for discovery will be sustained."

## CONCLUSION.

It is clear that there is no practical danger that the security of the country will be jeopardized by requiring the Secretary to consult the Trial Judge, personally if it be very important, or by one of his assistants if (as doubtless in the present case) it be less so. In such interview the Secretary can either convince the Judge that the documents are so vital to security that they must not be shown, even to the Judge, or the Judge, after looking at them, can decide what parts of them, if any, may not properly be shown to the other side. Should the Judge decide that items must be disclosed which the Secretary deems dangerous, he would certainly have the right to have the Circuit Court and this Court review such decision.

As Judge Maris of the Circuit Court put it (R. 56):

". . . Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government documents are submitted to them *in camera* under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged."

If both the District Court and the Circuit Court and this Court are clear that no jeopardy to the national security will result from the disclosure ordered, we may be entirely sure that the position of the Government is based on its

natural, although arbitrary, desire to be in no way supervised or interfered with, irrespective of the rights of innocent parties. We may also perhaps be not far wrong in assuming what we believe to be the conclusion in the present case, that the Government has no sound defense on the merits, and that no injustice will result if the Government chooses, in order to avoid the objectionable disclosure, to be subjected to the procedural disadvantage here directed.

Respectfully submitted,

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